TAIPING TOWN COUNCIL v. BEH CHENG SIEW

[A. Cr. J. (Thomson J.) March 31, 1955]

[Ipoh — Criminal Revision No. 2 of 1955]

Town Boards Enactment (Cap. 137), s. 17(ii) — Failure to comply with order — Whether Court can punish for continuing offence subsequent to date of sentence.

The accused in this case was charged with failure to comply with a Notice requiring him as owner of certain premises to provide modern sanitary installation within 3 months of receipt of the said Notice. He pleaded guilty and was convicted after he had made a statement which in effect amounted to announcing that he had no intention of complying with the order of the local authority. The sentence imposed required him to complete the work before a certain date and in default of that a fine of $5 per day thereafter.

Held: the sentence could not stand because in effect it amounted to refraining from punishing the accused for an offence he had committed but punishing him for one which he had not committed in the event of his committing it at some time subsequent to the date of sentence.

In the circumstances of the case the Court ordered the accused to appear before it to show cause why a lawful sentence should not be imposed upon him.

CRIMINAL REVISION.

Cur. Adv. Vult.

Thomson J. : — The Accused in this case appeared before the Magistrate at Taiping on the following charge :—

"That you Beh Cheng Siew. on 20.10.1954 did fail to comply with a notice served on you on 10.7.54, requiring you as owner of premises No. 24A & 24B, Jalan Iskandar, Taiping, to provide Modern Sanitary Installation on the said premises within three months of the receipt of the said notice and thereby committed an offence punishable under Section 17(ii) of the Town Boards Enactment, Cap. 137."

He pleaded guilty and was convicted after he had made a statement which in effect amounted to announcing that he had no intention of complying with the order of the local authority. The following sentence was then imposed upon him on 27th November, 1954 :—

"Defendant to complete the work on or before 8.1.55 and in default of that I impose a fine of $5 per day from 9.1.55."

That sentence cannot stand because in effect it amounts to refraining from punishing the accused for an offence he had committed but punishing him for one which he had not committed in the event of his committing it at some time subsequent to the date of sentence.

Section 17(i) of the Town Boards Enactment empowers a Town Board when making by-laws to prescribe, subject to certain limits, the penalties for any breach of such by-laws. When advantage is not taken of this provision the position is governed by Section 17(ii) which reads as follows :—

"Any person who contravenes any by-law for the breach of which no fine is prescribed and any person who fails to comply with the terms of any order lawfully made or any notice lawfully given by the Board or the Chairman under the provisions of any by-law, if no other penalty is prescribed, shall be punished with a fine which may extend to two hundred and fifty dollars or in the case of a continuing offence to the sum of ten dollars a day for every day during which such offence is continued."

In the present case the accused was served on 10th July, 1954, with a notice requiring him to do certain work within three months, that is to say, not later than 10th October, 1954. The charge against him was that on the 20th October, 1954, he had failed to comply with that order. In other words, he had commenced to commit the offence on 11th October and had continued to commit it so far as the charge was concerned and so far as the Court was concerned until 20th October. It was the business of the Court to deal with the charge as it stood and as it stood by reason of Section 17(ii) of the Town Boards Enactment a fine could be imposed not exceeding $250 or $10 a day for every day during which the offence continued which in this particular case meant a maximum of $100. As $250 is more than $100 that was the maximum fine which could be imposed.

In view of the fact that the Accused has a previous conviction for the same offence and in view of his defiant attitude there could be no question of treating the matter as trivial and therefore it was the duty of the Court to impose a fine within that maximum of $250 and perhaps, I may add, consisting of an amount very close to that maximum. That was all the Court could do at that stage. If his disregard of the order served upon him continued after 20th October, the remedy, and, indeed, the duty, of the public authority was to prosecute him again and to such a prosecution relating to any periods subsequent to 20th October, 1954, a conviction on the present charge would have been no bar.

There is a considerable body of Indian authority on the point to which I do not consider it necessary to refer for it is an elementary principle that a man cannot be punished for an offence which he has not committed and that is just what has been done in the present case. It is perhaps hardly necessary in the circumstances to add a reference to the difficulties which would arise in the event of it being sought to enforce a sentence such as has been made here. If there was controversy on the point, how could it be determined in the absence of a fresh charge how long the default had gone on? Or what would be the position if, in subsequent proceedings, the Accused wished to plead some perfectly good excuse relative to

his conduct subsequent to the date embodied in the charge but not in existence prior to it?

I have no hesitation in setting the sentence aside. Unfortunately I have no power to remit the case to the Magistrate to impose a suitable lawful sentence. There will accordingly be an order to the Accused to appear before this Court to shew cause why a lawful sentence should not be imposed upon him.

Order accordingly.

HEE CHENG v. KRISHNAN

[O. C. J. (Thomson J.) March 31, 1955]

[Ipoh — Civil Suit No. 225 of 1954]

Contract — Specific performance — State land held under Temporary Occupation Licence — Land Code (Cap. 138) — Land Rules, 1930, rr. 40 and 41 — Illegality under s. 24 Contracts (Malay States) Ordinance, 1950.

The plaintiff in this case claimed for specific performance or alternatively for damages for a breach of contract entered into between him and the defendant for the purchase of a house built upon a piece of land in respect of which a Temporary Occupation Licence was issued.

Held: the alleged contract was in fact an attempt to sell and to purchase defendant's rights under the Temporary Occupation Licence and therefore unlawful by reason of s. 24 of the Contracts (Malay States) Ordinance, 1950.

Case referred to :—

(1) *Phillips v. Copping* (1935) 1 K.B. 15, 21.

CLAIM for Specific Performance.

S. M. Sharma for the plaintiff.

B. K. Das for the defendant.

Thomson J. (delivering oral judgment) : — This is a claim for specific performance, or alternatively for damages for breach, of a contract which it is said was entered into between the plaintiff and the defendant in August, 1953, relating to Temporary Occupation Licence No. 43304 of which the defendant at all material times was and still is the holder, and a house built upon the piece of land in respect of which that licence was issued.

In my opinion the plaintiff's claim must fail.

In the first place, I am satisfied that on a true construction of the Plaint and on the view I take of the evidence as to what was, if the plaintiff's story be true, the intent of the parties, the alleged contract was in truth and in fact an attempt to sell and to purchase the defendant's rights under the Temporary Occupation Licence. As such, it was in my opinion, unlawful by reason of Section 24 of the Contracts Ordinance as being of such a nature that if permitted it would defeat the provisions of any law and that it is therefore by reason of that Section void.

The land in question is State land. Dealings in State land, other than mining land and land in Malay Reservation, are subject to the provisions of the Land Code and any subsidiary legislation enacted under it. The licence with which I am here concerned was issued under Regulation 40 of the Land Rules 1930 and by Rule 41 of these Rules it is stated in terms "No licence for the temporary occupation of State land shall be transferable". That is the provision of the law which would be defeated if effect were given to a contract of this nature.

In that connection I quote the following passage from *Pollock and Mulla's* book on the Indian Contract Act, 7th Edition, page 145 :—

> "Where a specific kind of land or specific rights in land have been declared by the Legislature to be not transferable, a transfer of such land or rights in land is void, as to permit it would be to defeat the provisions of the law within the meaning of the section."

'The Section', of course being section 23 of the Indian Contract Act.

I am not overlooking the point that this question of the contract being unlawful has not been specifically pleaded. There are obvious reasons why it was not pleaded. The defendant has subsequently entered into a similar sort of transaction and no doubt it did not lie in his mouth to plead its illegality. Nevertheless, to my mind, it is well settled law that when a question of this sort arises clearly on the evidence "it is the duty of the Court when asked to give a judgment which is contrary to a statute to take the point although the litigants may not take it." (See *Phillips v. Copping*[1]).

I am aware that it may be an inconvenient point to take. I have been told from the Bar, and I fully accept it, that transactions of this sort have been going on for very many years. That, however, does not affect the point. It is equally true that betting transactions have been going on for many years, yet the Courts are not asked to take cognizance of them. And again, if such transactions have been going on for many many years and a body of supposed rights and interests have been thereby created it is for the State to remedy any injustice that may have arisen by way of legislation and not for the Courts to attempt to do so by flying in the face of the law.

Such is my opinion as to the question of law that arises in the case. I may be right and I may be wrong. As the matter is of some importance, I can only express a hope that it may be taken further.